Supreme Court, U.S.
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No. 00-279

IN THE

SUPREME COURT OF THE UNITED STATES

ARCHDIOCESE OF OKLAHOMA CITY;
REVEREND CHARLES A. SALATKA;
REVEREND EUSEBIUS J. BELTRAN, and
OBLATES OF ST. FRANCIS DE SALES,

Petitioners,

v.

DENNIS W. BALLARD and RONALD BALLARD,
individually; and ALGERENE BALLARD,
individually; C.J., a minor, by and through his parents
and next of friends, JIMMIE BARTLETT JOHNSON, JR.
and PAMELA GAYLE JOHNSON; and
JIMMIE BARTLETT JOHNSON, JR., individually;
and PAMELA GAYLE JOHNSON, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment and Free Exercise clauses of the First Amendment grant a religious organization immunity from civil discovery concerning the hiring, placement and supervision of clergymen?

2. Whether the Free Exercise Clause of the First Amendment prohibits the exercise of subject matter and breach of fiduciary duty jurisdiction over common law negligent hiring, retention and supervision claim against a religious organization for the alleged tortious acts of a clergyman?

3. Whether the exercise of subject matter jurisdiction which will allow a jury in considering a common law cause of action for negligent hiring, retention, supervision and breach of fiduciary duty claim against a religious organization to determine a "reasonable bishop standard" violates the First Amendment prohibition of the state establishment of religion?

PARTIES TO THE PROCEEDING

The Petitioners are the Archdiocese of Oklahoma City, Reverend Charles A. Salatka, Reverend Eusebius J. Beltran, and Oblates of St. Francis de Sales. These parties were Defendants in the District Court of Oklahoma County, but were Petitioners in a Petition to the Oklahoma Supreme Court for the court to assume original jurisdiction and issue a writ of prohibition.

The Respondents and real parties in interest are Dennis W. Ballard, Ronald W. Ballard and Algerene Ballard and were plaintiffs in the District Court of Oklahoma County, Case No. CJ-99-6364-65.

The other Respondent in a minor whose identity is to be protected and who is identified as C.J., a minor, who is plaintiff in the District Court of Oklahoma County, CJ-99-6829-65.

Petitioners respectfully petition for writ of certiorari to review the judgment of the District Court of Oklahoma County.

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Church Petitioners respectfully petition for a writ of certiorari to review the decision of the Oklahoma County District Court on the issue of subject matter jurisdiction. The Oklahoma Supreme Court refused to review the matter on July 10, 2000.

OPINIONS BELOW

The Order of Oklahoma County District Court Judge Niles Jackson of May 15, 2000 is found in Appendix A, p. 1a. The Order of the Oklahoma Supreme Court of July 10, 2000 denying the Church Petitioners' Petition for that court to assume original jurisdiction and enter a writ of prohibition is found in Appendix B, p. 3a.

STATEMENT OF JURISDICTION

The trial court in the District Court of Oklahoma County, Seventh Judicial District of the State of Oklahoma, on May 15, 2000, entered an Order holding the court could exercise subject matter jurisdiction over the Church Petitioners. The Church Petitioners then petitioned the Oklahoma State Supreme Court to assume original jurisdiction over the case and enter a writ of prohibition to bar the trial court from asserting subject matter jurisdiction. The Oklahoma Supreme Court, on July 10, 2000, entered an Order denying the Church Petitioners' Petition.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

The Fourteenth Amendment states in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

A. The Facts.

Respondent/Plaintiff, Dennis Ballard, claims between 1992 and 1997, he was molested by a priest who pastored at the Assumption Catholic Church in Duncan, Oklahoma. Respondent/Plaintiff, C.J., a minor, claims that he was molested on one occasion by the same priest. They have sued the Church Petitioners in the District Court of Oklahoma County, State of Oklahoma, alleging vicarious liability and direct liability for intentional and reckless infliction of emotional distress, failure to warn, failure to report sexual abuse, breach of fiduciary duty, and for negligent hiring, retention and supervision of the priest. Respondents contend that the Church Petitioners knew or should have known of the history of prior alleged sexual misconduct of the priest in question. The Church Petitioners deny the Respondent/Plaintiffs' factual allegations.

The priest in question was associated with the Oblates of St. Francis de Sales which is based out of Toledo,

Ohio. The Oblates is a religious order which trains and ordains priests in the Roman Catholic Church, and coordinates the placement of those priests in various capacities across the country. The Oblates assigned the priest in question to assist the Archdiocese of Oklahoma City, Oklahoma in pastoring Assumption Parish in Duncan, Oklahoma. The priest in question was appointed by Respondent, Archbishop Charles Salatka on December 27, 1990.

On May 10, 1999, the Archdiocese received information alleging that the priest in question had molested Respondent/Plaintiff Ballard. The Duncan Police Department was notified by the Archdiocese on that date of the substance of Ballard's complaint. Criminal charges were filed against the priest. In December of 1999, the priest pled *nolo contendere* to three counts of lewd molestation.

B. Proceedings Below.

In 1999, the Respondents brought suit against the Church Petitioners, alleging vicarious liability and direct liability for intentional and/or reckless infliction of severe emotional distress, failure to warn, failure to report sexual abuse, breach of fiduciary duty, and for negligent hiring, retention and supervision of the priest in question. (See Third Amended Petition of Respondent/Plaintiff C.J., dated January 25, 2000, Appendix D, pp. 14a-22a); and Fourth Amended Petition of Respondent/Plaintiff Ballard, dated January 25, 2000, Appendix C, pp. 5a-13a.)

The Church Petitioners filed Motions to Dismiss on grounds of lack of subject matter jurisdiction and Respondents' failure to state a claim upon which relief can be granted. (See Motions to Dismiss of the Archdiocese, filed in each state court case on February 18, 2000,

Appendix E, pp. 23a-33a; and Amended Motions to Dismiss of Oblates, filed in each state court case on March 23, 2000, Appendix F, pp. 34a-55a and G, pp. 56a-78a.) The essence of the Church Petitioners' motions was that the First Amendment, by virtue of the incorporation Doctrine of the Fourteenth Amendment to the United States Constitution, prohibited the District Court of Oklahoma County, State of Oklahoma, from exercising subject matter jurisdiction based upon the allegations in the lawsuit in question. (Appendix E, pp. 23a-33a, F, pp. 34a-55a and G, pp. 56a-78a.)

Oklahoma County District Judge Niles Jackson overruled the Church Petitioners' Motions to Dismiss in a written Order dated May 15, 2000. (Appendix A, pp. 1a-2a.) Consequently, the Church Petitioners sought protection by requesting the Supreme Court of the State of Oklahoma to assume original jurisdiction of the matter and issue a writ of prohibition barring the District Court from exercising subject matter jurisdiction. (See Application to Assume Original Jurisdiction, Appendix L, pp. 120a-125a, and separate Brief in Support, Appendix K, pp. 104a-119a and P, pp. 164a-167a, filed by the Archdiocese on May 22, 2000, and by the Oblates on May 23, 2000.) (See also Applications to Assume Original Jurisdiction, Appendix M, pp. 126a-131a and O, pp. 158a-163a, and separate Briefs in Support, Appendix N, pp. 132a-157a and P, pp. 164a-167a, filed by the Oblates on May 23, 2000.) Again, it was argued that the exercise of subject matter jurisdiction by the lower court violated the First Amendment to the United States Constitution. On July 10, 2000, the Oklahoma Supreme Court denied the Church Petitioners' applications for the court to assume jurisdiction in order to consider their First Amendment jurisdiction contentions. (Appendix B, pp. 3a-4a.)

Meanwhile, discovery requests had been pending against the Church Petitioners in the trial court. On January 10, 2000, Respondents had issued Requests for Production of Documents and Requests for Admissions to the Oblates. (Appendix H, pp. 79a-84a and I, pp. 85a-93a.) On April 7, 2000, the Respondents had issued Requests for Production of Documents to Petitioner/Defendant Archdiocese of Oklahoma City. (Appendix J, pp. 94a-103a.) Additionally, Respondents had requested that Archbishops Salatka and Beltran be produced for deposition.

On June 1, 2000, the trial court had granted a motion to stay all proceedings until the Oklahoma Supreme Court had ruled upon the Church Petitioners' Application to Assume Original Jurisdiction and Petition for Writ or Prohibition. However, only seven days after the Church Petitioners' request to the state Supreme Court was denied, the Respondents had filed Motions to Compel against the Church Petitioners to force their responses to the outstanding discovery requests. (See Appendix S, pp. 198a-200a.) As of the time of the filing of this Petition for Certiorari, the lower court has not resolved the Respondents' Motions to Compel, but the hearing on the matter is set for August 22, 2000. (Appendix T, pp. 201a-202a.)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS JURISDICTION BECAUSE OF THE FINAL NATURE OF THE DISTRICT COURT'S RULING THAT IT HAS SUBJECT MATTER JURISDICTION OVER THE CHURCH PETITIONERS.

In the present case, by assuming subject matter jurisdiction in violation of the First Amendment, the state

threatens to force the Church Defendants to produce documents relating to the Priest reflecting ecclesiastical concerns in the placement and supervision of priests. Production of such documents will result in irreparable harm to the Church Defendants. The intrusion will be incapable of being undone.

By assuming such subject matter jurisdiction, the state threatens to intrude on church administration by subjecting churches to common law liability relative to selection, retention and supervision of ordained clergy. By assuming such subject matter jurisdiction, the state threatens to impose a "reasonable bishop" standard on the Church Defendants thereby unconstitutionally entangling the state in the internal affairs of all churches.

A. The Oklahoma Supreme Court's Refusal to Accept Original Jurisdiction and Issue Writ of Prohibiton Renders The Trial Court's Ruling Into a Final Judgment.

In instances where the highest court in a state has denied a Petition for Certiorari or Writ of Error, to examine a lower court decision, this Court has considered the ruling at issue to be a final judgment for purposes of exercising jurisdiction. *California v. Trombetta*, 467 U.S. 479, 484 (1984) (Court of Appeals decision reviewed after party unsuccessfully petitioned for certiorari in the state supreme court); *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963); *Western Union Tel. Co. v. Crovo*, 220 U.S. 364, 366 (1911) (Writ of Error denied by state supreme court, U.S. Supreme Court reviewed judgment of law and equity court).

The Oklahoma Supreme Court's refusal to act by issuing a Writ of Prohibition on the trial court's unconstitutional assertion of subject matter jurisdiction ren-

ders the trial court's decision a final judgment. This court has previously treated a state's highest court's inaction in failing to lift what appeared to be unconstitutional restraint as a final decision. *Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327, 1329-1330 (1975) (The delay by the Supreme Court of Nebraska in ruling would cause a delay "for a period so long that the very day by day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the petitioners possess and may properly assert"); *North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156, 161 n.4 ("We did not wait until litigation had been resolved in the state court, as the state court had finally determined its jurisdiction and erroneously".)

Plainly, the prospect of the lawsuit in question going forward against the Church Petitioners, and subjecting them to discovery, as well as the possibility of monetary damages for the exercise of their First Amendment rights in retaining and supervising a clergyman, would *not only chill,* but *irreparably* harm those constitutionally protected freedoms.

B. The Assertion of Subject Matter Jurisdiction And Requiring That Church Petitioners be Subjected to Discovery Cannot Be Meaningfully Reviewed At a Later Point By an Appellate Court.

The Constitutional issues of jurisdiction, excessive entanglement and intrusiveness of discovery would be moot if this Court does not grant certiorari. The proverbial horse will be out of the barn. This Petition is the last resort to bar the door before a constitutional deprivation runs wild.

The Church Petitioners have been requested, through the discovery process, codified by the Oklahoma Discovery Code, Title 12 O.S. §§3226, 3228, 3230, 3233, 3234 and 3237, to produce documents regarding church personnel policy and procedures. The Respondents have also sought discovery by way of deposition of Petitioners, Archbishops Beltran and Salatka, to question them about their mental processes concerning any supervision regarding the priest in question. Clearly, the breadth of Catholic theological and moral training will come under scrutiny. The church's teaching is geared to have one walk in moral purity before God.

In *N.L.R.B. v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court prohibited the National Labor Relations Board from exercising jurisdiction over a Catholic parochial school. The Court stated that the Board's exercise of jurisdiction over the parochial school to determine labor issues "would give rise to serious constitutional questions." *Id.* at 501. The Court found there is excessive entanglement into free exercise of religion issues. This Court stated: "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religious Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502. The Court referred to the deposition of the director of one of the schools as an illustration of the intrusiveness into such proceedings. The excerpts of the testimony of Monsignor O'Donnell indicates that he was examined concerning what type of prayers were defined as "liturgy" and how many masses were required of Catholic parochial high schools. *Id.* at 507-08. The testimony excerpts demonstrate this Court found that a constitutional infringement occurs when clergymen are deposed concerning the details of church policy relating to the theological func-

tions. A religious organization has immunity from civil discovery and judicial scrutiny regarding placement of clergy. See also, *First United Church v. White,* 571 A.2d 790, 792 (D.C. App. 1990); *Rayburn v. General Conf. of Seventh Day Adventists,* 772 F.2d 1164, 1171 (4th Cir. 1985).

The exercise of jurisdiction over the Archdiocese and Archbishops at issue is more intrusive than the state action in *Catholic Bishop,* supra. Here, the District Court seeks discovery concerning the placement of a clergyman which is in the very heart of the zone of First Amendment protection. Therefore, the instant Petition presents a more compelling case for this Court to grant certiorari than in the *Catholic Bishop* case.

The Oklahoma Supreme Court has refused to grant the Petition to Assume Original Jurisdiction in order to review the First Amendment issues of this case. Church Petitioners would be burdened with intrusive discovery, since they have been denied any appellate review. Church Petitioners will be ordered by the Court to cooperate with discovery, such as provide the production of documents or deposition testimony, or be subject to sanctions and the possibility of contempt of court as per Title 12 O.S. §3237. **Church Petitioners have no other avenue for protection from the state's exercise of jurisdiction – barring outright defiance of the trial court.**

This Court has granted jurisdiction where a petitioner could only preserve a constitutional issue in face of the real prospect of having to defy the court exercising jurisdiction. *North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156, 163 (1973) (Quoting Chief Justice Taney, "The right of appeal is of very little value to him and he may be ruined before he is permitted to avail himself of the right.") See also, *Cox Broadcasting*

Corp. v. Cohn, 420 U.S. 469, 506 (1975) (". . . where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court . . . sooner rather than later in the course of litigation.") (Rehnquist dissenting opinion).

This Court has granted petitions for certiorari, even though no trial on the merits had occurred, to decide the question of whether the Constitution itself would permit the assertion of jurisdiction. *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84, 90 n.4 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 195-196 n.12 (1977).

Accordingly, the intrusiveness of discovery in the free exercise of religion issues, together with the necessity to review subject matter jurisdiction, create a compelling situation for this Court to intervene by way of certiorari.

C. The First Amendment Protections to Church Petitioners Are Conclusive to Plaintiffs' Cause of Action.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-486 (1975), this Court identified four categories of cases in which federal issues could determine that a state court order could be deemed as "final", even though the state court proceedings had not been completed. The *Cox* criteria enables this court to assert jurisdiction through a Petition for Certiorari. The first criteria is whether the federal issue is conclusive. Should this court decide that Plaintiffs' lawsuit is barred by the First Amendment, it would effectively conclude the Plaintiffs' lawsuit.

D. The Issue of the Scope of First Amendment Protection Requires A Decision Concerning Jurisdiction Regardless of the Outcome of the State Proceedings.

Another instance wherein the Court could exercise jurisdiction under *Cox,* is when a federal issue, finally decided by the highest court in the state, will survive and require a decision regardless of the outcome of future state court proceedings. *Id.* at 480. As will be demonstrated in the following arguments, the heart of Plaintiffs' cause of action will bring review by a secular court of the internal functions and personnel placement of clergymen within the Archdiocese of Oklahoma City and the Oblates of St. Francis de Sales. Plainly, the degree of protection the Church Petitioners have under the First Amendment is vital to their defenses.

E. Refusal Of The Supreme Court To Review The First Amendment Issues In The Instant Case Would Seriously Erode Federal Policy Even Though The State Proceedings Are Arguably Not Final.

Cox permits this court to exercise jurisdiction where the state judgment finally disposes of a federal issue; reversal by the Court would terminate the state action; and the Supreme Court's refusal to review the federal issue might seriously erode federal policy. *Cox,* supra, at 482-83.

For instance, this Court has granted certiorari to review cases where state courts made decisions concerning the National Labor Relations Act. *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983); *Construction Laborers v. Curry,*

supra. Here, the issues involving the First Amendment Religion Clauses present vital federal policy considerations because the Constitution is the supreme of the law of the land.

On prior occasions, this Court has stated how fundamental free exercise of religion is to the concept of liberty in America. In *Catholic Bishop,* supra, this Court stated: "The values enshrined in the First Amendment plainly rank high 'in the scale of our national values'." U.S. at 501. See *Cantwell v. State of Connecticut,* 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment.") *Malloy v. Hogan,* 378 U.S. 1, 4 (1964) ("[I]mmune from state invasion [is] every First Amendment protection for the cherished rights of mind and spirit – the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.") The "exercise of religion" involves not only belief and profession, but the performance of physical acts. Among them are assembling with others for worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 877 (1990).

Traditionally, this Court has given special attention to First Amendment issues in ruling on questions of finality of judgment. For instance, in *Nat. Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977), this Court accepted jurisdiction on a Petition for Certiorari to decide First Amendment freedom of expression issues. The circuit court of Cook County entered an injunction prohibiting the National Socialist Party of America's members from marching within the Village of Skokie, Illinois. The Illinois Court of Appeals denied

an application for a stay pending appeal, as did the higher Illinois Supreme Court. The Illinois Supreme Court's denial of the stay, as a practical matter, "finally determined the merits of the petitioner's claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or two to complete." *Id.* at 44. The Illinois Supreme Court, by refusing to hear the matter, entered an order that "constituted a denial of that right." *Id.*

Later, in *Ft. Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989), this Court granted certiorari. The Court again recognized that adjudicating the proper scope of First Amendment protections as a "federal policy" merits the application to the exception of the general "finality" rule. *Id.* at 55. *Ft. Wayne* concerned the issue of whether the First Amendment was violated when a book store selling pornography was prosecuted under the state's RICO law. See also, *Miami Harold Publishing Co. v. Tornillo,* 418 U.S. 241, 246-47 n.6 (1974) ("Which ever way we decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of press under the First Amendment; an uneasy and unsettled constitution of posture could only further harm the operation of a free press.")

Certainly, under the Court's pronouncement in *Malloy,* supra, the freedom of religion is no less cherished than the freedom of speech in the press and right of association. Given the intrusiveness of a discovery process in this case, and the potential exposure for money damages, it is of national importance for religious organizations to have the U.S. Supreme Court articulate the extent of their protection under the First Amendment for alleged tortious conduct of clergymen.

II.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S TEACHING THAT THE FIRST AMENDMENT PROTECTS AGAINST THE STATE'S INTERFERENCE WITH A RELIGIOUS ORGANIZATION'S INTERNAL MATTERS THAT PERTAIN TO THE SELECTION AND SUPERVISION OF CLERGYMEN.

"First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Hull Church,* 373 U.S. 440, 449 (1969). This Court has held on prior occasions that civil courts must accept as conclusive the decisions of highest ecclesiastical judicatories of a hierarchical church in religious matters concerning clergymen. *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 727-729 (1871); *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 16 (1929); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church,* 344 U.S. 94, 113-115, 120-121 (1952) later opinion, *Kresshik v. St. Nicholas Cathedral of the Russian Orthodox Church,* 363 U.S. 190 (1960); *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 723 (1976).

In *Watson,* this court held a secular court has no jurisdiction, "*where a subject matter of dispute, strictly and purely ecclesiastical in its character, – a matter over which the civil courts exercise no jurisdiction. – a matter which concerns theological controversy, church discipline, ecclesiastical government, or the* ***conformity of members of the church to the standards of morals required of them,*** *– becomes the subject of its action.*" *Id.* at 733.

The reason why a secular court could not exercise jurisdiction was explained in *Watson:* "But it is easy to see that if the civil courts are to inquire into all of these matters, the whole subject of the doctrine of theology, the

usages and customs, the written laws, and fundamental organization of every religious denomination, and must be, examined into with minuteness in care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, which would open the way to all the evils which we have depicted . . ." *Id.* at 733-734.

The principle again was enunciated in *Gonzalez*, supra: "Because the appointment [to a chaplaincy] is a canonical act, it is the function of church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." U.S. at 16. See also, *Kedroff*, 344 U.S. at 116, supra. ("The freedom to select the clergy, where no improper methods of choice are proven, we think must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.") Likewise, in *Serbian Orthodox Diocese*, 426 U.S. at 723, the Court held, ". . . Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of higher polity on matters of discipline, faith, internal organizations, or ecclesiastical rule, custom or law."

Ironically, the Oklahoma Supreme Court has typically followed this Court's teachings to insulate religious organizations from the secular review of their administrative actions.[1] However, in the recent case of *N.H. v. Presby-*

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[1] *Bladen v. Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okla. 1993) (The Free Exercise Clause of the First Amendment must shield the church from tort liability on a parishioner's suit when the church's act occurs in the context of the church's ecclesiastical jurisdiction); *Hadnot v. Shaw*, 826 P.2d 978, 988 (Okla.

[footnote continued]

terian Church, (U.S.A.), 99 OK 88, ¶26, the Oklahoma Supreme Court declined to make a ruling on whether the First Amendment barred all employment related liability of religious organizations for the acts of its clergymen.[2] The court did hold, as a matter of law, that sexual contact between an ecclesiastical officer and parishioner is outside the scope of employment. *Id.* ¶17. In the instant case, the Oklahoma Supreme Court declined again to consider the vital issue of whether the First Amendment bars liability of a religious organization for the alleged torts of clergymen. It not only avoided that issue by refusing to accept original jurisdiction, but also the issue of whether intrusive discovery infringes on the free exercise of religion.

III.

THE EXERCISE OF SUBJECT MATTER JURISDICTION, AND SUBJECTING THE CHURCH PETITIONERS TO THE DISCOVERY PROCESS AND THE PROSPECT OF MONEY DAMAGES IS NOT THE LEAST RESTRICTIVE MEANS IN PROTECTING THE INTERESTS OF THE STATE AND INDIVIDUALS FOR VINDICATION OF THE TORTIOUS ACTS OF CLERGYMEN.

In the cases invoking free exercise analysis, the Court has applied the compelling state interest test. *Sherbert v.*

1992) ("When the target of civil litigation is the church's implementation of its valid ecclesiastical judicature, the Free Exercise Clause of the First Amendment will afford a shield from interference by secular inquest"); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 772, n.18 (Okla. 1989) (". . . We are of the opinion that a church's disciplinary decisions are protected from judicial scrutiny . . .").

[2] "Because we hold that – even assuming an agency or employment relationship between Brigden [the clergyman] and the national organization – no liability may be imposed, we need not determine whether the First Amendment would stand as bar to all employment-related liability of an ecclesiastical organization for its ministerial officers." *Id.* ¶26.

Verner, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). The compelling state interest test requires a three stage analysis: (1) whether the conduct in question is motivated by a sincerely held religious belief; (2) whether the state action infringes on the free exercise of religion; and (2) whether there is a state interest of sufficient magnitude to override the interest claiming the protection of the Free Exercise Clause. *Yoder*, supra. The third stage of this analysis requires a balancing of interest: Whether the state's interest is so compelling that the church's free exercise interest must give way. If an overriding interest is demonstrated, the state must use the *least* intrusive means to protect that interest. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Thomas v. Review Board*, supra; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In the present case, the compelling state interest is arguably that of protecting children from sexual predators. However, the state already has mechanisms in place to further that interest – civil and criminal penalties against the molester. The least intrusive means would allow the criminal prosecution of the offending clergymen. The offending clergymen would also be subject to a civil suit for any damages. The fact that a religious organization where the clergyman is associated has a "deep pocket" should not alter the least intrusive means balancing test. The Respondents' lawsuit is illustrative of the broad shotgun effect of lawsuits for the tortious conduct of the clergymen. Every religious organization associated with the priest in question has been targeted by the Respondents for a broad dragnet to be summoned to the bar and exposed to the prospect of a money damages judgment.

The unconstitutional prosecution of the "deep pocket" Church Defendants, in a lawsuit seeking money damages, is not the least intrusive means to accomplish the state's interest of protecting children.

The Oklahoma courts allow common law claims against an employer for their agents' wrongful acts if the employer had notice of the agents' propensities. *Presbyterian Church,* supra, ¶21 1999 OK 88. It is anticipated that the Respondents will claim that such a facially neutral law can be applied to religious organizations without offending the Constitution. However, even application of a neutral law can have an impermissible impact upon protected religious beliefs. A facially neutral law is not determinative in finding whether it will pass constitutional muster. *Gilette v. United States,* 401 U.S. 437, 452 (1971). The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Id.*; *Bowen v. Roy,* 476 U.S. 693, 703 (1986) (Opinion of Burger, C.J.). A regulation neutral on its face, in its application, may offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. *Wisconsin v. Yoder,* 406 U.S. 205 (1972). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeh,* 580 U.S. 520, 534 (1983).

In Respondents' lawsuit, a jury would have to decide how a "reasonable bishop" should properly supervise a clergyman. They would choose one form of supervision over another. This targeting of religious practice does

not pass the muster of the Free Exercise Clause. More damaging is the end result of such lawsuit leads to the indirect control over the future affairs of a religious denomination, creating a chill on the exercise of religion.

It is undisputed that the Christian faith emphasizes such theological teaching as mercy, forgiveness and redemption and rehabilitation commonly called, "grace". A sinner saved by grace can be redeemed to walk in moral purity.

Such concepts stem from deep religious convictions, shared by an organized group, which are intimately related to the relationship of the Church Defendants with its clergy. The balancing of interests test applied by this Court does not allow governmental inquiry into the reasonableness of beliefs which are fundamental to the Roman Catholic faith, when other less intrusive means exist to protect the state's interest. The balancing test requires the state to use those alternative methods which do not infringe upon First Amendment rights.

One need look no farther than the Scriptures to see these concepts carried out. The Book of Exodus reveals that Moses, the Deliver, had murdered an Egyptian,[3] yet God still used him for service to lead the Israelites to the Promised Land. King David of Israel was confronted by the prophet Nathan that he arranged for the untimely death of Bathsheba's prior husband.[4] Psalm 51 records his repentance: "Create in me a pure heart oh God; and renew a right spirit within me."[5] The Book of Acts records that St. Paul persecuted Christians and had them imprisoned for their faith.[6] St. Paul wrote the majority

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[3]Exodus 2:11.

[4]II Samual 12:1-14.

[5]Psalm 51:10 KJV.

[6]Acts 9:1-2.

of the text of the New Testament, yet still considered himself to be the "chief of sinners".[7] There is clearly a dichotomy in perspectives between secular standards of employment and ecclesiastical standards with regard to the hiring, supervision and retention of clergymen. What may be an unacceptable past in a secular view, may not disqualify one from ministry because of grace.

The "notice requirement" is not neutral and does not remove First Amendment barriers. It fails to take into account situation where a clergyman may have fallen off the "straight and narrow path", and underwent therapy and penance under the Church's guidance. The Church would deem the rehabilitation spiritually sufficient to release the clergyman back into pastoral duties. A lawsuit under the "notice requirement" would allow a secular court to second guess the reasonableness of the spiritual rehabilitation undertaken by the Church of the clergyman, because he "strayed" again. Accordingly, the least restrictive way so as not to infringe on the free exercise of these religious concepts would be for the clergyman, himself, to be subject to criminal and civil sanctions, which already exist to protect children from sexual misconduct.

The Supreme Court of Wisconsin recognized the constitutional problems of this same dilemma in the case of *L.L.M. v. Clauder*, 563 N.W. 2d 434 (Wis. 1987). It observed:

> "The reconciliation and counseling of the errant clergyperson involves more than a civil employer's file of reprimand or a three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers, but they have

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[7] 1 Timothy 1:15 KJV

no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices. Therefore, due to the strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly estrange itself from the religious doctrines of faith, responsibility and obedience." *Id.* at ¶ 23.

The *Clauder* court found that the First Amendment barred such negligent supervision lawsuits against a religious organization.

IV.

CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICTS BETWEEN THE VARIOUS STATE AND FEDERAL COURTS ON WHETHER THE FIRST AMENDMENT WOULD ALLOW A CAUSE OF ACTION AGAINST A RELIGIOUS ORGANIZATION FOR THE ALLEGED TORTS COMMITTED BY CLERGYMEN.

The following cases recognized for a court to assume jurisdiction over the matter would create excessive entanglement between church and state and, thus, violate the First Amendment.

The leading case in this vein is *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D. N.Y. 1991), which arose out of a claim that a minor was molested by a minister. Thus, the minor sued the National Presbyterian Church for the alleged negligent retention and placement and supervision of the minister. The words of the opinion capture the heart of Church Petitioners' defense in the instant case:

"Furthermore, any inquiry into the policies and practices of the *church defendants in hiring or supervising their clergy* raises the same kind of First

> Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church defendants' supervision in light of their religious beliefs. Insofar as concerns, retention or supervision, the pastor of a Presbyterian church is not analogous to a common law employee. He may not demit his charge, nor be removed by the session, without the consent of the Presbytery, functioning essentially as an ecclesiastical court. The traditional denominations each have their own intricate principles of governments, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over almost to millenia. . . .
>
> **It would, therefore, also be inappropriate and *unconstitutional* for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant bishop.** Any award of damages would have a chilling affect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the Establishment Clause." *Id.* at 332. (emphasis added)

In a lawsuit involving a Catholic archdiocese involving allegations of sexual molestation of a young boy, the court in *Ayon v. Gourley,* 47 F.Supp.2d 1246 (D. Colo. 1998), made the following holding:

> "The court finds that plaintiff's negligent hiring claim would violate both the free exercise and establishment clauses. Like the majority of cases cited, this court finds that consideration of **the hiring policies of the archdiocese defendants would inevitably require examination of church policy and doctrine. The choice of individuals to serve as ministers is one of the most fundamental rights belong-**

ing to a religious institution. It is one of the most important exercises of a church's freedom from government control. For this court to insert itself into the process by which priests are chosen would substantially burden these defendants' free exercise of a crucial power to control the future of the church and, therefore, constitute interference with the practice of their religion.

'It would also cause excessive entanglement in church operations by fostering an appropriate government involvement. The application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness. Such court examination and oversight of internal church policies would constitute an encroachment upon the church's religious functions." *Id.* at 1250.

In the instant case, the trial court accepted jurisdiction in this matter, and has put itself in the awkward position of evaluating the theological concepts of "grace" and "mercy". "Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort law reasonableness of the church's mercy toward of the offender. . ." *Pritzlaff v. Archdiocese of Milwaukee,* 194 Wis.2d 302, 533 N.W.2d 780, 790 (1990) cert. denied ___ U.S. ___ , 116 S.Ct. 920, 133 L.Ed.2d 849 (1996). In wrestling with the same issue, the Maine Supreme Court found: "To import agency principles wholesale into church governance and to impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control denominational governance." *Swanson v. Roman Catholic Bishop,* 692 A.2d 441, 445 (Me. 1997). The Maine court went on to conclude: ". . . imposing a secular duty of supervision on

the church and enforcing that duty through civil litigation . . . would not serve a societal interest sufficient to overcome the religious freedoms inhabited." *Id.*

Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) (First Amendment barred a negligent failure to supervise a clergyman. "Adjudicating reasonableness of a church's supervision of a cleric – what the church 'should know' – requires inquiry into religious doctrine."); *Doe v. Evans,* 718 So.2d 286, 291 (Fla.App. 4 Dist. 1998) ("[A] court's determination regarding whether the church defendant's conduct was 'reasonable' would necessarily entangle the court in issues of the church's religious law, practices and policies. 'Hiring' in a traditional sense does not occur in some religions, where a person is ordained into a particular position in the church, and is assigned to one parish or another.")

The following cases hold that the First Amendment does not bar negligent hiring causes of actions against religions organizations: *Bear Valley Church of Christ v. DeBose,* 928 P.2d 1315 (Colo. 1996) cert. denied, 520 U.S. 1241; *Parks v. Kownacki,* 305 Ill.App.3d 449, 711 N'E.2d 1208 (1999); *Doe v. Hartford Roman Catholic Diocesan Corp.,* 716 A.2d 960 (1998); *Kenneth R. v. Roman Catholic Diocese of Brooklyn,* 229 A.D.2d 159, 654 N.Y.S.2d 791 (1997) cert. denied, ___ U.S. ___, 118 S.Ct. 413 (1997).

Because of the split of authority on this issue, it is critical to the well-being of religious liberty in this country that this Court weigh in and resolve these issues by granting certiorari in this case.

V.

SUBJECTING RELIGIOUS ORGANIZATIONS TO A "REASONABLE BISHOP" STANDARD IS VIOLATIVE OF THE ESTABLISHMENT CLAUSE.

The Church Petitioners would submit that the Respondents' cause of action for negligent hiring, retention, supervision and breach of fiduciary duty violates the establishment clause. Such scrutiny of church policy, procedure and hiring and supervision practices would cause the secular court to cause entanglement with religion, contrary to the test the Supreme Court set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Supreme Court of Wisconsin recognized the constitutional problems in allowing a negligent hiring and retention lawsuit to proceed against a religious organization and its *L.L.M. v. Clauder* decision, supra. It found that a negligent supervision claim would "require a court to formulate a 'reasonable cleric' standard, which would vary depending on the cleric involved." It also cited with approval the following language from a Law Review article, *Clergy Sexual Misconduct, Confronting the Difficult Constitutional & Institutional Liability Issues*, 7 St. Thomas L. Rev. 31 (1994): "Our pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi', 'reasonable bishop', etc., because of the degree of involvement that must accompany such a decisional framework for a civil tort judge."

VI.

AN EXERCISE OF SUBJECT JURISDICTION BY THE STATE COURT WOULD LEAD TO AN UNAVOIDABLE CLASH WITH THE CANON LAW OF THE CATHOLIC CHURCH.

The following Code of Canon Laws of the Catholic Church are applicable to the facts as alleged in Plaintiffs' Petition because the bishop's exercise of discretion while under the inspiration of the Holy Spirit has clearly been put at issue by the Plaintiffs. Plaintiffs' lawsuit would require a jury to review the reasonableness of how the bishop exercised his discretion in carrying out his duties outlined under the canon law of the church.

"Canon 375:

> (1) Bishops, who by divine institution, succeed to the place of the apostles *through the Holy Spirit* who has been given to them, are constituted pastors in the church, so they are teachers of doctrine, priests of sacred worship, and ministers of governance.
>
> (2) Through episcopal consecration itself, bishops receive, with the function of sanctifying also the functions of teaching and *governing*, by their nature, however, these can be exercised only in the hierarchical communion with the head and members of the college." (emphasis added) (Appendix U, p. 203a)

Canon 524 discusses the bishop's authority to place priests he sees fit under the inspiration of the Holy Spirit as described in Canon 375:

"Canon 524:

> After he [the bishop] has weighed all the circumstances, the diocesan bishop is to confer a vacant parish on the person whom he judges suited to fill

its parochial care without any partiality; in order to make a judgment concerning a person's suitability, he is to listen to the vicar forane, conduct appropriate investigations and, if warranted, listen to certain presbyters and lay persons of the Christian faithful." (emphasis added) (Appendix U, p. 205a)

Canon 524 makes it very plain that the bishop has the discretion, under the inspiration of the Holy Spirit, to make decisions as to the qualifications of placing a priest in a given parish.

Equally formal and binding is the *Catechism of the Catholic Church* which is a compilation of the theological teachings and beliefs of the Roman Catholic Church. This document was, in 1994, promulgated by His Holiness, Pope John Paul II. Paragraphs 894 and 895 of the *Catechism* further describe the power of the bishops to govern the affairs of the Catholic Church.

No. 894:

"The bishops, as vicars and legates of Christ, govern the particular Churches assigned to them by their counsels, exhortations, and example, but over and above that also by the authority and sacred power, which indeed they ought to exercise to as to edify, in the spirit of service, which is that of their Master." (Appendix V, p. 107a)

No. 895:

"The power which they personally exercise in the name of Christ is proper, ordinary, and immediate, although it's exercise is ultimately controlled by the supreme authority of the church. But the bishops should not be thought of as vicars of the Pope. His ordinary and immediate authority over the whole church does not annul, but on the contrary, confirms and defends that of the bishops. Their

authority must be exercised in common with the whole Church under the guidance of the Pope." (Appendix V, pp. 207a-208a)

The lawsuit in question has placed at issue how the Church Petitioners would apply the aforementioned Catholic teachings. For instance, Canon 375 states that bishops succeed the place of the apostles "through the Holy Spirit" who has been given to them are pastors in the church. Canon 524 discusses the bishop's authority to place priests that he sees fit under the inspiration of the Holy Spirit to weigh all the circumstances and place the person he judges suited to fill the parochial care of a parish. How is a jury supposed to evaluate the archbishop's communion with the Holy Spirit? No. 894, the catechism of the Catholic Church, states that bishops are "vicars and legates of Christ". No. 895 states that bishops exercise authority "under the name of Christ" and "under the guidance of the Pope". How can a jury not evaluate an archbishop's supervision without reference to the church's doctrine and Canon law and catechisms? How is an archbishop to know if a priest has sufficiently repented of past sins? Again, the answer to the question requires reference to theological doctrine, as well as the spiritual guidance of the Holy Spirit that would enable the archbishop to make such decisions.

The jury's determination of what a reasonable bishop should do forces them to decide how a church should go about selecting clergymen and supervise them. See *Gibson v. Brewer,* 952 S.W.2d 239, 247 (Mo. banc 1997) ("This would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision.") **This, in effect, establishes an official state religion.** In its review of this situation, a jury must make

a decision between what is a good way to supervise priests and what is a bad way. Rather than being neutral toward religion, in the instant case, the government, by way of a jury's determination, would have a hostile stance against the Church Petitioners should liability be imposed. An establishment of religious practice is not neutral. The establishment of religion under the "notice requirement" would have a jury determine that a "reasonable bishop" should bar a clergyman from ministry if he has a criminal background, even though he has repented from those deeds. The excessive entanglement in religious practice is manifestly evident.

CONCLUSION

Wherefore, above premises considered, Church Petitioners pray this Court to grant their Petition for Certiorari.

Respectfully submitted,

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